Petition

81-1461

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

OSCAR E. CONTRERAS, et al., Petitioners,

v.

CITY OF LOS ANGELES, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 14, 1981

QUESTIONS PRESENTED

1. Whether Title VII requires a showing of adverse impact to be "statistically significant" in order to establish a prima facie case that the selection practice is unlawfully discriminatory?

2. Whether a District Court must make specific findings under the Albermarle "professionally acceptable methods" standard when material defects in a validity study are raised and whether on appeal such findings are entitled to deferential review as "credibility determinations"?

PARTIES TO PROCEEDING

The Plaintiffs/Petitioners are Oscar E. Contreras, Eloy Gonzales, Maria Gonzalez, Sam Mock, Jr. and Salvador A. Zavala. The Defendants/Respondents are the City of Los Angeles and Muriel Morse in her official capacity as General Manager of the City of Los Angeles Personnel Department.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, as amended, is reported at 656 F.2d 1267 and appears as Appendix "A" hereto. The Memorandum Opinion of the District Court for the Central District of California, not officially reported, appears as Appendix "B". The District Court's Findings of Fact and Conclusions of Law appears as Appendix "C".

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1981. A timely petition for rehearing with suggestion for rehearing en banc was denied by an order filed September

14, 1981 (Appendix "D"), and this petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under Section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and under 28 U.S.C. §1331 as a case presenting a general federal question.

The plaintiffs are hispanics who, defendant's own officials admitted at trial, had for years been performing their jobs as Senior Accountants and Auditors in an "outstanding" manner. (R.T. 27-38; Plaintiffs' Exhibits 2-6.)[1] Indeed, the District Court found that they were "performing their duties efficiently." (Appendix "B", p.

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[1] "R.T." precedes citations to
[Footnote continued on next page.]

3.) Nonetheless, the plaintiffs were removed from their jobs because they failed to pass a civil service written test.

This anomolous event arose from defendant City of Los Angeles' decision to transfer the plaintiffs' positions from the Mayor's Office to a City department. The transfer caused these jobs to come, for the first time, under the City's civil service requirements. As a consequence, the plaintiffs were required to take a written test in order to qualify for, and thus retain, the jobs in which they had been performing so well.

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[1] [Continued from previous page.] the Reporter's Transcript of the trial; "R." precedes citations to the Record on Appeal.

Adverse Impact of the Senior Accountant Written Test

The plaintiffs were not the only hispanics who did not perform well on the written test. The substantial adverse effect the Senior Accountant test had on hispanic applicants as compared to white applicants can first be seen from the comparative pass rates. The pass rate for whites was 55.0% (22 of 40) while the hispanic pass rate was only 29.4% (5 of 17). (R. 653-54.) Similarly, the mean or average score for hispanics (60.7) was substantially lower than the mean score for whites (67.2). (R. 652.)

These facts were corroborated by expert testimony at trial that it is a general finding in the testing

field that written tests have a "very marked" adverse impact upon hispanics. (R.T. 491-92.) Expert testimony at trial further corroborated the adverse impact on actual applicants by establishing the facts that: (a) the difference in mean scores for hispanic and white applicants is statistically significant (R.T. 482-84); (b) the difference in pass rates "falls just short of statistical significance" and if there had been a slightly larger number of hispanic applicants who passed the test in the same proportion as the actual applicants, the difference would be statistically significant (R.T. 487-89); and (c) when the pass rate statistics for the three similar tests (for Senior Accountant, Auditor and Senior

Auditor) are combined, the difference in pass rates is statistically significant (R.T. 484-85).

The District Court's ruling on adverse impact was described by the Court of Appeals as follows:

> "The district judge, relying on evidence produced by the City, rejected the accountants' proof of a prima facie case for two reasons. First, he placed little evidentiarly weight on the examination results because the figures, although disparate, were not statistically significant when tested at a .05 level of significance. Second, he concluded that the accountants scored low because they failed to study seriously in preparation for the examination." (Appendix "A", p. 3.)

The second reason given, of course, does not relate to the question of adverse impact but rather to whether one or more of the

plaintiffs failed the test for some reason other than its adverse impact.[2] Hence, the absence of statistical significance was really the sole basis for the finding of no adverse impact.[3]

The Court of Appeals affirmed the finding no adverse impact for the Senior Accountant test.

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[2]Indeed, with all the plaintiffs eliminated, the hispanic pass rate is 38.5% which is still substantially below the 55.0% pass rate for whites.

[3]It should be noted that the Memorandum Opinion written by Judge Crary made no explicit finding on adverse impact. Rather, a finding that plaintiffs had met their prima facie burden is implicit in the Court's statement that "[t]he major issue to be determined is whether the tests have 'content validity.'" (Appendix "B", p. 13.) The findings referred to by the Court of Appeals were first set forth in the subsequently filed Findings of Fact and Conclusions of Law drafted by the City's attorneys.

Validity Studies

The Court of Appeal held that the adverse impact of the Auditor test had been established. Hence, the Court of Appeals examined the adequacy of the validity study submitted by the City in support of the job-relatedness of the Auditor test.

The validity study purported to show the "content validity" of the test. This study was performed a mere month before the trial by analysts in the City's personnel department and it was admitted that the decision to perform the studies was made in a meeting in the City Attorney's office in which strategy for this lawsuit was being discussed. (R.T. 291.)

At trial, plaintiffs pointed out the following material defects in the validity studies:

(a) A content validity study must show the knowledges, skill or abilities tested are "necessary prerequisites to performance of critical or important work behavior(s)." §14.C.(4) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 et seq. ("Uniform Guidelines"). In the defendants' study, the standard utilized was whether the knowleges or skills tested were related to or "included in" one of a number of general subject matter categories, e.g., general accounting, cost accounting, auditing, etc. Of course, a question on the test might involve a knowledge that is included

in the subject matter of cost accounting but for content validity to be achieved it must be shown that this cost accounting knowledge is a "necessary prerequisite" for performance in the City's Auditor position.

(b) Because content validity is based on subjective judgments, there must be controls for potential bias of the persons making the judgments. (R.T. 517-20.) Here, not only were there no controls for bias, but also the persons making the question-by-question analysis of the test were all City employees, were supervised by employees of the City's personnel department and were informed that the prupose of their analysis was to enable the City to defend the instant lawsuit. (R.T. 227, 291.) Expert

testimony at trial established that a content validity study performed under such circumstances is so inherently subject to bias that it does not meet "even minimum scientific standards of objectivity." (R.T. 518.)

(c) A content valid test should not test for knowledges or skills that can be learned on a brief orientation to the job. Uniform Guidelines, §14.C.(1). Defendants' validator admitted that no analysis was performed to determine whether the knowleges or skills tested could be learned on a brief orientation to the Auditor position. (R.T. 303-06.)

(d) A content validity study must find that the level of difficulty of the knowledge or skills tested matches the level of

difficulty required to perform the job. Uniform Guidelines, §§14.B.(4), 15.C.(3). Again, defendants' validator admitted that the study failed to perform this necessary analysis. (R.T. 296.)

REASONS FOR GRANTING THE WRIT

1. The Adverse Impact Standard Applied Below Effectively Overrules Griggs v. Duke Power Co. and Would Severely Limit the Impact of Title VII.

This Petition presents the Supreme Court with the second of the two critical issues facing the lower courts in making findings on the adverse impact issue in Title VII cases. This Court has already granted certiorari in Teal v. State of Connecticut, 50 U.S.L.W. 3244 (October 6, 1981) to address the issue whether an employer can interpose a "bottom line" defense to a showing that a selection practice

has had an adverse impact by establishing no significant adverse impact of the overall selection process. The issue presented by this Petition is what proof is required for a finding that there has been "significant" adverse impact. It is respectfully suggested that these two cases can be decided in tandem to give a full explication of the adverse impact showing.

This issue is of critical importance because the adoption of a "statistical significance" standard will effectively merge the adverse impact and disparate treatment theories of discrimination thereby emasculating, if not overruling, Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Ninth Circuit's holding that the adverse impact of a

selection practice must be statistically significant at a .05 level of significance requires plaintiffs to meet the same high level of proof to establish adverse impact as the Supreme Court has required to establish a prima facie case of purposeful discrimination in Castaneda v. Partida, 430 U.S. 482 (1977) and Hazelwood School District v. United States, 433 U.S. 299 (1977).[4] The thrust of the Supreme Court's holding in Griggs, however, was that discriminatory intent need not be shown when "employment

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[4]The .05 level of statistical significance equates to a difference of 1.96 standard deviations which is in practical terms the equivalent of the 2 to 3 standard deviation standard set forth in Castaneda and Hazelwood. See EEOC v. American National Bank, 652 F.2d 1176, 1192 (4th Cir. 1981).

testing mechanisms . . . operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability," 401 U.S. at 432.

The practical effect of a statistical significance standard would be devastating to Title VII enforcement efforts. A statistically significant adverse impact can be established, for all practical purposes, only where there are a large number of applicants who are subjected to the same selection practice. It is a statistical fact that the smaller the number of applicants, the greater the adverse impact must be to attain statistical significance. (R.T. 486.) Hence, a statistical significance standard would exempt from Title VII coverage all selection practices except those

used by large employers for large job classifications.

For instance, a statistical significance standard would cause the selection practices of small employers to become virtually immune from Title VII. The Tenth Circuit, in rejecting the statistical significance standard, recognized this inevitable consequence when it stated that:

> "The smallness of the sample [of actual applicants] should not be grounds here for rejecting the proof. If it were, the tendency would be to deny employees in small plants the type of protection the civil rights statutes afford."

Chicano Police Officer's Ass'n v. Stover, 526 F.2d 431, 439 (10th Cir. 1975), vacated in light of Washington v. Davis, 426 U.S. 944 (1976).

Similarly, a major loophole would be created for large employers who could immunize their selection practices from Title VII scrutiny either by (a) dividing their workforce into numerically small job classifications or (b) continually changing their selection practices so that only a small number of persons are ever subjected to a particular practice. Cf. Chicano Police Officer's Ass'n v. Stover, supra at 439 n. 8.

All that would remain of Title VII enforcement would be cases against large employers with one or more large job classifications and cases of intentional discrimination. This result is clearly contrary to the Supreme Court's prior recognition that Title VII was enacted to

eradicate discrimination "throughout the economy" (emphasis added), Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975), and "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens," McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

2. There Is Considerable Conflict Among the Circuits Concerning the Proper Standard for Showing Adverse Impact.

Despite ten years of cases applying the Griggs adverse impact theory of discrimination, the lower courts are still unsure of the

appropriate standard to apply in establishing the adverse impact prima facie showing. Anomalous rulings are resulting.

For example, the Fifth Circuit in Moore v. Southwestern Bell Tel. Co., 593 F.2d 607 (5th Cir. 1979) remarked that:

> "The Supreme Court has not ruled definitively as just what threshold mathematical showing of variance along racial lines suffices as a 'substantial disproportionate impact.'" Id. at 608.

The Fifth Circuit then proceeded to resolve the issue by finding no adverse impact without articulating any standard. The irony is that the disparity in pass rates in Moore was statistically significant at well beyond the .05 level of statistical

significance and hence could have established a prima facie case of intentional discrimination.

Two circuits have held that a statistical significance standard applies to the adverse impact showing: (1) the Ninth Circuit in the instant case; and (2) the Eighth Circuit in Hameed v. Iron Workers, 637 F.2d 506 (8th Cir. 1980). In Hameed, the adverse impact standard is stated at 637 F.2d 512-13 as follows:

> "If the use of selection criteria or tests results in differential pass rates for whites and blacks, the difference could be due to legitimate selection criteria, racially discriminatory criteria, or chance. See generally D. Baldus & J. Cole, Statistical Proof of Discrimination 288-92 (1980). If tests of statistical significance

> eliminate chance as a likely explanation for the differential pass rates, courts will presume that the disparate pass rates are attributable to racially discriminatory selection criteria. Castaneda v. Partida, 430 U.S. 482, 496-97 (1977); Hazelwood School District v. United States, 433 U.S. 299, 308-09 n. 14 (1977). The defendant can avoid liability under Title VII by showing that the differential pass rates were caused by legitimate selection criteria which are justified by business necessity."

Four circuits have specifically rejected the statistical significance standard: (1) the First Circuit in Boston Chapter, NAACP Inc. v. Beecher, 504 F.2d 1017, 1020 (1st Cir. 1974); (2) the Second Cir. in Vulcan Society of the New York Fire Dept. v. Civil Service Comm'n, 490 F.2d 387, 393 (2nd Cir. 1973);

(3) the Fifth Circuit in James v. Stockholm Valves & Fittings Co., 559 F.2d 310, 337 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); and (4) Chicano Police Officer's Ass'n v. Stover, 526 F.2d 431, 439 (10th Cir. 1975), vacated, 426 U.S. 944 (1976). The language in Vulcan Society rejecting this standard, which was later adopted in the Boston Chapter, James and Stover cases, is as follows:

> "It may well be that the cited figures and other more peripheral data relied on by the trial judge did not prove a racially disproportionate impact with complete mathematical certainty. But there is no requirement that they should." 490 F.2d at 393.

The federal Uniform Guidelines on Employee Selection Procedures, 29

C.F.R. Part 1607 et seq. (1978) also reject the statistical significance standard. At Section 4.D. the guidelines adopt a "four-fifths rule" as the basis for an adverse impact finding. The reason for adopting this standard rather than the statistical signficance standard is explained by the same federal agencies that adopted the guidelines at Question 24 of the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," 44 F.R. 11966 (March 2, 1979), which reads as follows:

> "Q. Why do the Guidelines rely primarily upon the 4/5ths rule of thumb, rather than tests of statistical significance?

> "A. Where the sample of persons selected is not large, even a large real difference between groups is likely not to be confirmed by a test of statistical significance (at the usual .05 level of significance). For this reason, the Guidelines do not reply primarily upon a test of statistical significance, but use the 4/5ths rule of thumb as a practical and easy-to-administer measures of whether differences in selection rates are substantial. Many decision in day-to-day life are made without reliance upon a test of statistical significance." (Emphasis added.)

The statistical significance standard has been adopted by the Courts to insure that the facts showing adverse impact of a selection practice are reliable, i.e., are not just a chance occurance. Other circuits, however, have dealt with the reliability of actual pass rates by looking to corroborating evidence

including but not limited to showings of statistical significance. See, e.g., Boston Chapter, NAACP Inc. v. Beecher, 504 F.2d 1017, 1020-21 (1st Cir. 1974) (minimal showing of higher minority failure rate corroborated by significant disproportionality in minority employment and by expert testimony that minority candidates typically perform more poorly on paper-and-pencil tests); Douglas v. Hampton, 512 F.2d 976, 983 (D.C. Cir. 1975) (factual demonstration corroborated by body of evidence that blacks and other disadvantaged groups perform far below whites on generalized intelligence or aptitude tests and by facts in judicial decisions showing "blacks are test-rejected more frequently than whites"); Dendy v. Washington

Hospital Center, 581 F.2d 990, 992 (D.C. Cir. 1978) (adverse impact based on small numbers but "statistical analysis showed them to reflect a discriminatory impact that could not reasonably be ascribed to chance alone"); and EEOC v. American National Bank, 652 F.2d 1176, 1194 (4th Cir. 19181) (adverse impact of selection practice in one job category can be corroborated by looking at "patterns from the total range of hiring decisions affecting all categories during a charged period of discrimination"). Similar corroborative evidence was introduced by the plaintiffs in the instant case. See Statement of the Case, supra.

The Supreme Court in Furnco Construction Corp. v. Waters, 438

U.S. 567, 577 (1978) recognized that discrimination inquiries should not be "rigid, mechanized, or ritualistic." Rather, the Supreme Court in Furnco adopted a discrimination standard viewed as "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Id. Plaintiffs submit that the statistical significance standard is a "rigid, mechanized and ritualistic" approach to the adverse impact question and should be rejected in favor of a standard that takes into consideration a wide variety of corroborative facts based on "common experience".

3. The Decision Below Seriously Dilutes the "Rigorous" Standard Required by the Supreme Court for Validating a Selection Procedure in Terms of Job Performance.

The Court of Appeals held that the review of a district court's finding that a validity study (i.e., a formal study examining whether a selection procedure is related to job performance) was performed in accordance with professionally acceptable methods is a "credibility determination" that "will not [be] disturbed." (Appendix "A," p. 13.) This holding would so severely limit appellate review of criticisms of a validity study's methodology that the district courts would be given

unbridled discretion in this most sensitive and important determination.

The Supreme Court in Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) established the standard against which a validity study must be measured when it ruled that "professional acceptable methods" must be employed in conducting the study.[5] The Court looked to both the federal government's guidelines and Association's professional standards as being exemplary of "professionally

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[5]The Supreme Court later referred to this Title VII standard as being "rigorous" when contrasting it to the Constitutional standard. Washington v. Davis, 426 U.S. 229, 246-47 (1976).

acceptable methods."[6] In fact, the Court went on to measure the defects in Albermarle's validity study against the federal guidelines.

The assessment of the "material defects" by the Supreme Court in Albermarle shows that the "professionally acceptable methods" standard was not intended to be a "credibility determination" but rather a reasoned determination which measures the methods followed in the validity study against concrete professional standards. The district court's should, therefore, enter findings addressing each of the

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[6]The federal guidelines are now incorporated in the Uniform Guidelines on Employee Selecton Procedures, 29 C.F.R. Part 1607 et seq. (1978) and the APA's current standards are set forth in the "Standard for Educational and Psychological Tests" (1974).

alleged defects advanced by a plaintiff in which the criticism is measured against applicable professionally acceptable standards. The courts of appeal may then review these findings like any other finding

The need for this more rigorous approach can be seen from the illogical result obtained in the instant case. The plaintiffs were admittedly "outstanding" employees who had been performing their jobs at the City for a period of years. A quirk in the civil service system required all persons in their division of the Mayor's office to go through civil service examination procedures when their jobs were transferred to a City department. For all but the plaintiffs' jobs, the examination procedure was an oral

interview - including their sister job of Accountant - and all their fellow employees retained their jobs.

The plaintiffs, however, were required to take written tests which supposedly were designed to measure their ability to perform their own jobs. The four Senior Accountant plaintiffs failed the written test and the Auditor plaintiff received such a low score that she would never be reinstated.

The logical conclusion from these admitted facts is that the written test must require some knowledges which are not required to perform the plaintiffs' jobs. Nevertheless, the City sought to validate these tests by showing them to be "content valid" which is a showing that the test is composed of

a representative sample of "knowledges, skills or abilities" that are "necessary prerequisite[s] to successful job performance." [Emphasis added.] Uniform Guidelines, §14.C.(1). And, the courts below held that this content validity study was acceptable proof of the test's job-relatedness.

It is submitted that the holding below is illogical and that the City's validation methodology must be flawed. To allow such a holding to stand will only serve to encourage employers to replicate the City's obviously inadequate validation strategy to avoid their obligations under Title VII.

An illogical conclusion is not surprising when the basis for the lower court's rulings is

scrutinized. The District Court in the instant made only a conclusionary finding "that the tests were job related to the plaintiffs' duties and that the validation study was adequate in the circumstances." (Appendix "B," p. 18-19.) This meager finding is understandable only because the District Court rejected the "professionally acceptable methods" standard in Albermarle urged by plaintiffs and instead held that defendants can rely on any "competent and relative evidence." (Appendix "B," p. 17; Appendix "C," p. 16.)[7]

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[7]The case relied upon by the District Court in support of this lesser standard, Blake v. City of Los Angeles, 15 FEP Cases 76 (C.D. Cal. 1977), was later reversed by the [Footnote continued on next page.]

The Court of Appeals was relying solely on the District Court's conclusionary finding based on an erroneous standard when it held that the validity study issue was entitled to deferential review as a "credibility determination." In dissent, Circuit Judge Thomas Tang made the telling point that "[w]hen a district court's factual findings are induced by an erroneous conception of the law, . . . we are not free to indulge in a deferential review." (Appendix "A," p. 25.)

The Court of Appeals compounded

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[7] [Continued from previous page.] Ninth Circuit which specifically rejected this standard in light of the Albermarle "professionally acceptable methods" standard. 595 F.2d 1367, 1378 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980).

its error of deferential review by assessing the plaintiffs' criticism without the benefit of specific findings by the District Court. The following anomalous holdings resulted:

(a) The heart of the validity study was a review of each question to determine whether the knowledge, skill or ability measured by the question was "included in" one of the broadly-defined fields of general accounting, cost accounting, auditing, etc. One would expect that questions on an accounting test would fit into one of these general categories but one would not expect every knowledge included in these fields to be a "necessary prerequisite" for performance in the City's Auditor job. Uniform

Guidelines, §14.C.(4). The panel, however, relied on the arbitrary labeling of these general categories as "critical elements" to justify finding each tested trait to be essential to the job. Clearly, the panel had only a superficial understanding of the validity study's actual methodology. (Appendix "A," p. 14).

(b) The City's own validators admitted that the study did not assess whether the knowledge tested could be learned on a brief orientation to the job. (R.T. 303-06.) Yet, the panel's opinion concludes, without even a finding of fact by the District Court, that such an analysis was performed. (Appendix "A," p. 14-15.) See Uniform Guidelines, §14.C.(1).

(c) Similarly, the City's validators admitted that the study failed to determine whether the level of difficulty of the test was comparable to level required to perform the job. (R.T. 296.) The panel again makes a contrary finding, not made by the District Court, that the validity study did evaluate the comparative level of difficulty of the test and the job. (Appendix "A", p. 15.) See Uniform Guidelines, §14.C.(3).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Opposition

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Title VII require, and did the court of appeals require, that a disparity be shown to be "statistically significant" to support an adverse impact prima facie case?

2. Where a validity study of a selection device has been challenged, is an explicit finding that the study was conducted using "professionally acceptable methods" required under *Albemarle Paper Co. v. Moody?* Regardless of the detail of such findings, should any standard other than "clearly erroneous" be employed to review them on appeal?

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No. 81-1461

IN THE

Supreme Court of the United States

October Term, 1981

OSCAR E. CONTRERAS, *et al.*,

Petitioners

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Background

The five petitioners are hispanics who were once employed in the Training and Job Development Division of the Office of the Mayor of the City of Los Angeles ("the City"). One of the petitioners, Maria Gonzalez, worked as an auditor, while each of the others held positions as senior accountants. When originally hired, and during their entire tenure in the Mayor's Office, none of the petitioners was subject to the competitive testing requirements of the City's civil service system.

In early 1976 the City created a Community Development Department, and several divisions, including petitioners', were assigned to it. This reorganization placed petitioners

under the City's civil service system, requiring petitioners to compete successfully on written examinations for Auditor and Senior Accountant classifications.[1] Fearing potential inequities to the petitioners from the reassignment, the City Council proposed an amendment to the City's charter for the upcoming November, 1976 election ballot exempting incumbent employees from the examination requirement.

Prior to the election, four of the petitioners took a written examination for the Senior Accountant classification and petitioner Maria Gonzalez took an examination for the Auditor classification. The City's voters rejected the proposed Charter amendment.

Senior Accountant Examination

Each of the four Senior Accountant petitioners failed to pass the written examination for the classification. Petitioners introduced evidence at trial that 5 of 17 (29.4%) of

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[1]The City utilizes a merit system for selection and promotion of employees subject to its civil service requirements. See 42 U.S.C. § 2000e-2(h). Under this system, both the Senior Accountant and Auditor examinations administered in this case were given to all applicants meeting the minimum qualifications for each classification. Those applicants obtaining a predetermined cutoff score were given oral competitive interviews. Bonus points for seniority and military service were added to the written and oral scores to yield a combined score for ranking purposes. A list of all persons with combined scores above a predetermined figure was certified. The individual selected for any position opening within a classification must be chosen from the top three names remaining on the certified list for the classification.

It must be emphasized that "passing" a written examination for a general classification is in no way equivalent to selection for a specific position opening. Selections are made from a ranked list in an effort to provide employment to the best qualified candidate available for the specific opening, not to any candidate deemed minimally qualified for employment in the general classification.

Furthermore, a candidate selected for an opening in a given classification may eventually be assigned to perform any duties appropriate to that classification throughout the City's civil service system. The examinations each of the petitioners took covered the duties appropriate to the general classifications of Senior Accountant and Auditor, and were not designed to test the specific functions which each petitioner had previously been performing. Petitioners' attempt to equate the jobs they held with the classifications for which they tested (Pet. 4) misstates the facts presented to the court of appeals and the district court.

the hispanic applicants taking the Senior Accountant examination passed, while 22 of 40 (55%) of the whites taking the test passed. The mean score for hispanic applicants on the examination was 60.7, while that for the white candidates was 67.2. An expert witness testified on behalf of petitioners that Spanish-surnamed individuals generally perform more poorly than whites on written examinations.

The City introduced evidence at trial that the average examination score of the Senior Accountant petitioners was 11.58% below the average score of the other 13 hispanic applicants who took the test. Evidence was also presented that petitioners did not prepare seriously for the examination and that they expected either approval by the electorate of the Charter amendment or administration of a second examination after the election. An expert witness for the City testified that the observed disparity between white and hispanic performance was not statistically significant, primarily because of the small sample size under consideration.

The district court concluded that the Senior Accountant petitioners failed to make out a prima facie case that the examination they took had a disparate impact on hispanic applicants. First, the court found that:

> "when the [Senior Accountant petitioners] took the examination, they did not take the test seriously, based on their erroneous belief that the test would not be crucial to their jobs. In addition, the [petitioners] also failed to adequately prepare themselves for the test.
>
> . . . The fact that the [petitioners] did not attempt to seriously perform well on the Senior Accountant examination and did not adequately prepare for the test, is corroborated by the fact that they performed in a considerably poorer manner than other Spanish surnamed individuals taking the examination. Thus, the statistical 'pass-fail' rate for Spanish surnamed per-

> sons, as a group, was lower than it should have been due to [petitioners'] failure to take the examination seriously. In addition, there were too few Spanish surnamed individuals taking the Senior Accountant examination to have statistically significant results."

Pet. App. C-6 to C-8.

In affirming the result on the Senior Accountant examination, the court of appeals again summarized the evidence supporting the City's position:

> ". . . [T]he City's expert testimony, the small statistical base, and the impeachment of the statistics by evidence of the accountants' failure to study, all convince us that the district court's conclusion was not an unreasonable interpretation of the evidence presented."

656 F.2d at 1274, Pet.App. A-21.

Auditor Examination

Petitioner Maria Gonzalez passed the Auditor examination, but scored too low to be employed in her previous capacity in the City's new Community Development Department. Although disputing the statistical basis for petitioner Gonzalez' prima facie case of adverse impact, the City concentrated its efforts at trial on demonstrating that the Auditor examination was "job related" to the Auditor classification. The City introduced evidence through expert testimony that the Auditor examination was "content validated" by professionally acceptable methods. Evidence demonstrated that the City had carefully analyzed the Auditor classification by organizing a group of auditors and auditor supervisors to determine the critical elements of the job. The group compiled a list of tasks performed by persons assigned to auditor positions and determined the skills, knowledges, and abilities required to perform those tasks.

These job elements were ranked independently by each member of the analysis team on the basis of the importance of each element to the classification of Auditor. From the average of these rankings a prioritized list of elements critical to the Auditor classification was generated. Finally, the analysis team weighted each of the prioritized elements according to its relative importance to the classification, with the final weighting being an average of the team members' views. The examination taken by petitioner Gonzalez was shown to have been produced from the results of this analysis.

Further evidence by the City demonstrated that, subsequent to administration of the examination, the test was reviewed by a new group of analysts selected from a number of civil service auditors and supervisors working for the City. Each examination question was individually reviewed to determine whether it in fact assisted in evaluating one of the elements previously determined to be critical to the job.

The district court gave judgment to the City on the dual bases that (a) petitioner Gonzalez had failed to demonstrate a prima facie case that the Auditor examination results yielded a statistically significant adverse impact against hispanic applicants and (b) the City had shown the examination to be "job related." The court of appeals held the district court's conclusion as to petitioner Gonzalez' prima facie case was clearly erroneous, but on the basis of the standards promulgated by *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the City had succeeded in demonstrating that the Auditor examination was "job related," thus rebutting the inference of discrimination raised by petitioner's statistical showing of disparity.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Holding on the Lack of a Prima Facie Showing of Disparate Impact on the Senior Accountant Examination Is Consistent With Decisions of This Court and Does Not Raise an Important Question of Federal Law

Petitioners contend that the district court held, and the court of appeals affirmed, that a disparity between the results obtained by identifiable groups on a written examination employment selection device must be "statistically significant," as that term is understood professionally, to enable petitioners to prove a prima facie case of adverse impact against a protected group. Petitioners further contend that such a requirement has a devastating effect on the ability of small sample groups to demonstrate adverse impact, and that "considerable conflict" exists among the circuits on whether a showing of statistically significant disparity is prerequisite to a prima facie case.

a. Petitioners Misread the Court of Appeals Holding

Petitioners maintain that the court of appeals held that a prima facie adverse impact case is synonymous with a showing of statistically significant disparity *simpliciter*. Pet. 15-16. They proceed to argue that such a rule invites the use by employers of small sample sizes to avoid Title VII liability by preventing showings of statistically significant disparity. Pet. 17-19.[2] This argument mischaracterizes the holding below. The court of appeals did not equate the prima facie case with statistically significant disparity to the ex-

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[2]The thought that employers can escape Title VII liability by configuring groups of examination applicants into small samples is unsupportable. If attempted in litigation, such statistics would be easily impeached. If utilized as an employment practice, a prima facie case of purposeful adverse treatment would be shown.

clusion of all other means of proof. Instead, the court followed the standards enunciated by this Court by holding that statistical evidence is simply an important mode of proof and one which may suffice to establish a prima facie case of adverse impact. It is not, however, the exclusive means of such proof, and it is not to be considered in a vacuum, unaffected by other evidence which may controvert or qualify its meaning. In a sense, therefore, the petitioners are building the proverbial straw man and asking this Court to strike him down.

Regardless of the merits of petitioners' contention that a showing of statistical significance should not be required, the issue is simply not presented by the record of this case. Both the district court's findings of fact, Pet.App. C-6 to C-8, and the court of appeals' opinion, 656 F.2d at 1273-74, Pet.App. A-17 to A-21, list several reasons for questioning the validity of petitioners' statistical showings of disparate examination results. Petitioners urge that these alternative reasons relate solely "to whether one or more of the plaintiffs failed the test for some reason other than its adverse impact." Pet. 7-8. Such a view is fallacious, since it fails to recognize that proof of adverse impact of the Senior Accountant examination against hispanics is dependent in part on the scores obtained by the four petitioners who took that test. Any facts tending to show that the scores obtained by petitioners were low for reasons other than the nature of the test questions, such as inadequate preparation by petitioners, may be properly advanced in opposition to the adverse impact showing.

b. The Standard Petitioners Suggest for Use in Evaluating Statistical Showings in Adverse Impact Cases Was in Fact Employed by the Court of Appeals

The very statistical approach petitioners ask this Court to endorse was in fact applied by both the district court and

the court of appeals. The proper standards for the use of statistics in employment discrimination litigation have been repeatedly articulated. The court of appeals set out the leading authorities in the course of clearly defining its holding:

> " '[S]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) ("*Teamsters*"), *quoting Mayor of Philadelphia v. Educational Equality League, supra*, 415 U.S. at 620, 94 S.Ct. at 1333."

656 F.2d at 1272, Pet.App. A-12.

The court of appeals also noted the concern of this Court in *Teamsters* that "[c]onsiderations such as small sample size may, of course, detract from the value of such evidence," 431 U.S. at 340 n.20, and further cautioned that:

> "[t]he use of statistical evidence is 'conditioned by the existence of proper supportive facts in the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn.' *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (footnote omitted)."

656 F.2d at 1272, Pet.App. A-12 to A-13.

The thrust of these authorities, and the view adopted by the court of appeals, is that statistical measures are no different from any other form of evidence; they cannot be evaluated in a vacuum but must be considered in light of all of the surrounding circumstances:

> " 'It is for the District Court, in the first instance, to determine whether these statistics appear sufficiently probative of the ultimate fact in issue - whether a given job qualification requirement has a disparate impact on some group protected by Title VII.' *Dothard v. Raw-*

linson, supra, 433 U.S. at 338, 97 S.Ct. at 2731 (Rehnquist, J., concurring)."

656 F.2d at 1273, Pet.App. A-17.

Evidence before the district court revealed that 55% of the whites taking the Senior Accountant examination passed. Of 17 hispanics taking the same examination, 5 passed, representing 29.4%. These disparate results could have been produced by legitimate employee selection criteria, impermissible racially discriminatory criteria, differences in preparation by the persons tested, or random chance. *Hameed v. Iron Workers Local 396*, 637 F.2d 506, 512 (8th Cir. 1980). See generally, D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 288-92 (1980). The function of statistical analysis in employment discrimination cases is simply to rule out random chance as a plausible source of observed disparities. In some situations, however, such as the present one, the small size of a test sample cannot sufficiently eliminate chance as a reasonable explanation for the observed data.

The court of appeals clearly expresses its willingness, however, to find a prima facie case based on statistical disparity alone, provided the showing is insufficiently controverted:

> "Statistical disparities alone may constitute prima facie proof of discrimination. *New York Transit Authority v. Beazer*, 440 U.S. 568, 584, 99 S.Ct. 1355, 1365, 59 L.Ed.2d 587 (1979); *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977); *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873, 891 (C.D.Cal. 1976). Although the prima facie requirement is not automatically satisfied by statistical evidence of adverse impact, we hold that

> a prima facie case is established when such evidence of discriminatory impact is completely uncontroverted."

656 F.2d at 1275, Pet.App. A-27.

The record of the present case demonstrates, however, that the City buttressed its attack on petitioners' statistical showing by offering evidence of a lack of preparation by petitioners, an expectation by petitioners of a reprieve by the City's electorate, and a belief by petitioners that a second examination would be given in the event of an unfavorable election result. Far from being unrelated to the question of adverse impact as petitioners contend (Pet. 7), these facts serve to flesh out the court of appeals' conclusion that no prima facie case was proven:

> "Employers 'may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.' *Dothard v. Rawlinson, supra,* 433 U.S. at 338-39, 97 S.Ct. at 2731-32 (Rehnquist, J., concurring)."

656 F.2d at 1273, Pet.App. A-18.

Petitioners believe that a "statistically significant" standard is excessively "rigid, mechanized and ritualistic" and "should be rejected in favor of a standard which takes into consideration a wide variety of corroborative facts based on 'common experience.' ". Pet. 29. As is explained *supra,* such corroborative facts were fully explored in both courts below, and each found them to impede, rather than assist, petitioners' efforts to demonstrate a presumption of discrimination in the Senior Accountant examination.

c. The Statistical Significance Issue Is Not Ripe for Review, Since Factors Other Than Small Sample Size Contributed to the Court of Appeals Decision

Even if this Court is inclined to grant a writ to permit review of the appropriate value of statistical proof in small sample size cases, this issue is not framed by the record below. As explained *supra*, the district court expressly found that the Senior Accountant petitioners did not prepare adequately for their examination, did not believe the electorate would require the examination, and were convinced a second test would be administered if the voters felt that exemption from competitive selection procedures was not warranted. Pet.App. C-6 to C-7. In addition, petitioners performed considerably more poorly than other hispanics taking the same examination. Pet.App. C-7. These factors undermined petitioners' statistical showing of adverse impact by explaining petitioners' poor performance and the contribution that performance made to the combined results of the hispanics who took the test. Pet.App. C-7 to C-8. In addition, however, these factors demonstrate that the small sample size issue petitioners advance is not actually before the Court.

What is presented is a question of the causal relationship between petitioners' inability to qualify for Senior Accountant classification positions and alleged unlawful discrimination in the administration of the written test for that classification. Petitioners contend that their failure was caused by the content of the test itself. The City asserts that the cause of the disparity observed in the test results was largely petitioners' lack of preparation rather than any inherent impact of the examination content.

Because both the district court and the court of appeals relied in large measure on causative factors completely unrelated to the small size of the applicant pool, or to any

statistical analysis whatever, the issue on which this petition is grounded becomes even more illusory. Clearly this case does not present the important issue of federal law petitioners assert, nor does it offer a question of significance to anyone other than the parties hereto.

d. The Circuits Are Uniform in Their Approach to Evaluating Statistical Showings in Support of an Adverse Impact Prima Facie Case

Petitioners attempt at great length to demonstrate "considerable conflict among the circuits" concerning the proper standard for evaluating statistical showings of disparity in adverse impact cases. Pet. 20-29. This effort is devoid of merit for several reasons. First, none of the court of appeals cases cited by petitioners deals with the question whether the disparate results obtained by a small sample of applicants on an employment selection device may fail to support an adverse impact prima facie case. Only one of the cited cases, *EEOC v. American National Bank*, 652 F.2d 1176 (4th Cir. 1981) has anything to do with sample sizes too small to demonstrate statistically significant disparity. It does not deal, however, with written examinations, but with work force populations as possible indicators of past discriminatory hiring practices.

Each of the cases cited by petitioners to support their "conflict" argument applies the statistical evidence evaluation process outlined *supra*. The issue in all of these cases, however, was the materiality of the statistical showing made, not the sample size under scrutiny. In *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), for example, plaintiffs demonstrated that blacks in general performed more poorly than whites on the Wonderlic general intelligence examination and that blacks had been excluded from entire classes of jobs for which a high Wonderlic score was

required. Plaintiffs failed to show, however, how any specific applicant or group of applicants performed on the examinations administered by defendants. The Court of Appeals for the Fifth Circuit held that a prima facie case of discrimination in the hiring process was made out on the basis of the wholesale exclusion of blacks from entire job categories, notwithstanding the lack of a showing of statistically significant adverse impact against a specific group of blacks on the Wonderlic. Similar results on similar facts were obtained in other cases cited by petitioners, such as *Chicano Police Officers Assn. v. Stover*, 526 F.2d 431 (10th Cir. 1975), *vacated*, 426 U.S. 944 (1976), and *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974).

The remaining cases cited by petitioners deal with written examinations given to sample sizes large enough to produce statistically significant evidence of adverse impact. *See, e.g., Vulcan Society of the New York Fire Dept. v. Civil Service Commission*, 490 F.2d 387 (2nd Cir. 1973); *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Dendy v. Washington Hospital Center*, 581 F.2d 990 (D.C. Cir. 1978). In each case the probative value of the statistical data, and the methods by which they were gathered, were questioned. None of these cases, however, articulates whether disparities must be statistically significant to support a prima facie case under an adverse impact theory.

Petitioners cite only two cases, the court of appeals decision herein and *Hameed v. Iron Workers Local 396*, 637 F.2d 506 (8th Cir. 1980), to support their misguided "considerable conflict among the circuits" reasoning. Petitioners urge that a statistically significant disparity must be proven under each of these cases to support a prima facie showing of adverse impact. As outlined *supra*, neither the district

court nor the court of appeals imposed such a burden below. Similarly, *Hameed* gives no support to petitioners' claim.

Hameed dealt with the statistical analysis of a written examination which allegedly operated to exclude blacks from entering a union apprenticeship program. Following an excellent review and application of the statistical methodology approved in *Castaneda v. Partida*, 430 U.S. 482 (1977), and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), *Hameed* concluded that a prima facie case was abundantly proven, with chance virtually eliminated as a cause of the disparities observed. 637 F.2d at 512-14 ns. 8-9. At no point, however, did *Hameed* hold, or even imply, that the rigorous methods utilized therein were required in all cases or were the only acceptable means of demonstrating a prima facie case. Petitioners' statements to the contrary, Pet. 22-23, are simply in error.

2. The Auditor Examination Was Found to Be Job Related, Based Upon Application of Standards Articulated by This Court

In concluding that the Auditor examination was job related, the court of appeals utilized the test validation standard first articulated in *Albemarle Paper Co. v. Moody*, *supra*:

> "We hold that discriminatory tests are impermissible unless shown, by professionally accepted methods, to be predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which candidates are being evaluated."

656 F.2d at 1280, Pet.App. A-54; *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 431; *see also* 29 C.F.R. §1607.5C (1978).

Petitioner Gonzalez focuses on whether "professionally acceptable methods" were indeed employed during both the

job analysis and post-examination review phases of the validation study of the Auditor examination. In particular, she questions what she considers to be the court of appeals' view that the professional acceptability of the methods employed in the present case was an unreviewable credibility determination of the district court.

It is true that the court of appeals accepted the district court's resolution of the conflicting evidence of professionally acceptable methods in favor of the view advanced by the City at trial. Petitioner Gonzalez fails to point out, however, that the court of appeals reached and resolved, by a different route, each of her test methodology concerns. Since the court of appeals recognized that "[m]ethodological defects clearly may reduce the probative value of a validation study," 656 F.2d at 1283, Pet.App. A-69, it carefully addressed each of the alleged validation defects cited by petitioner Gonzalez. 656 F.2d at 1283-84, Pet.App. A-69 to A-79.

Petitioner Gonzalez calls for detailed findings relating each methodology to some "concrete" professional standards. Pet. 32. Such a demand seeks to place *Albemarle's* requirement of professional acceptability on a level significantly above other expert evidence, significantly above any point contemplated by the courts. "Professionally acceptable methods" are, after all, nothing more than the competing opinions of professionals with different points of view. None of these opinions is entitled to acceptance in the abstract, and each should be accorded greater or lesser credibility depending upon the objective facts, theoretical underpinnings, or other matter advanced in support of them. The court of appeals took precisely this approach in considering whether "professionally acceptable methods" had been employed to demonstrate the job relatedness of the Auditor examination. "That the validation was profession-

ally acceptable is demonstrated by expert testimony in the record and the failure of each of Gonzalez' challenges." 656 F.2d at 1284, Pet.App. A-78 to A-79.

Regardless of the merits of petitioner Gonzalez' views that the Auditor examination was not job related, she now carefully sidesteps the issue that was before the court of appeals when it evaluated the City's job-relatedness proof. The question faced on review was, and remains, whether the district court's conclusion on the test validation issues was "clearly erroneous" in light of the array of evidence presented at trial. *See Washington v. Davis*, 426 U.S. 229, 251-52 (1976). The court of appeals resolved that question only after a detailed analysis of the trial record. 656 F.2d at 1283-84, Pet.App. A-69 to A-79. No basis for disturbing its conclusion appears in the petition before this Court.

CONCLUSION

For the above reasons, the City respectfully prays that the petition for writ of certiorari be denied.

February, 1982

Respectfully submitted,

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